CASES AND MATERIALS
ON THE LAW
OF TORTS
EXPERIMENTAL EDITION
PART I

E.R. Alexander

J.B. Dunlop

Faculty of Law

University of Toronto

1982

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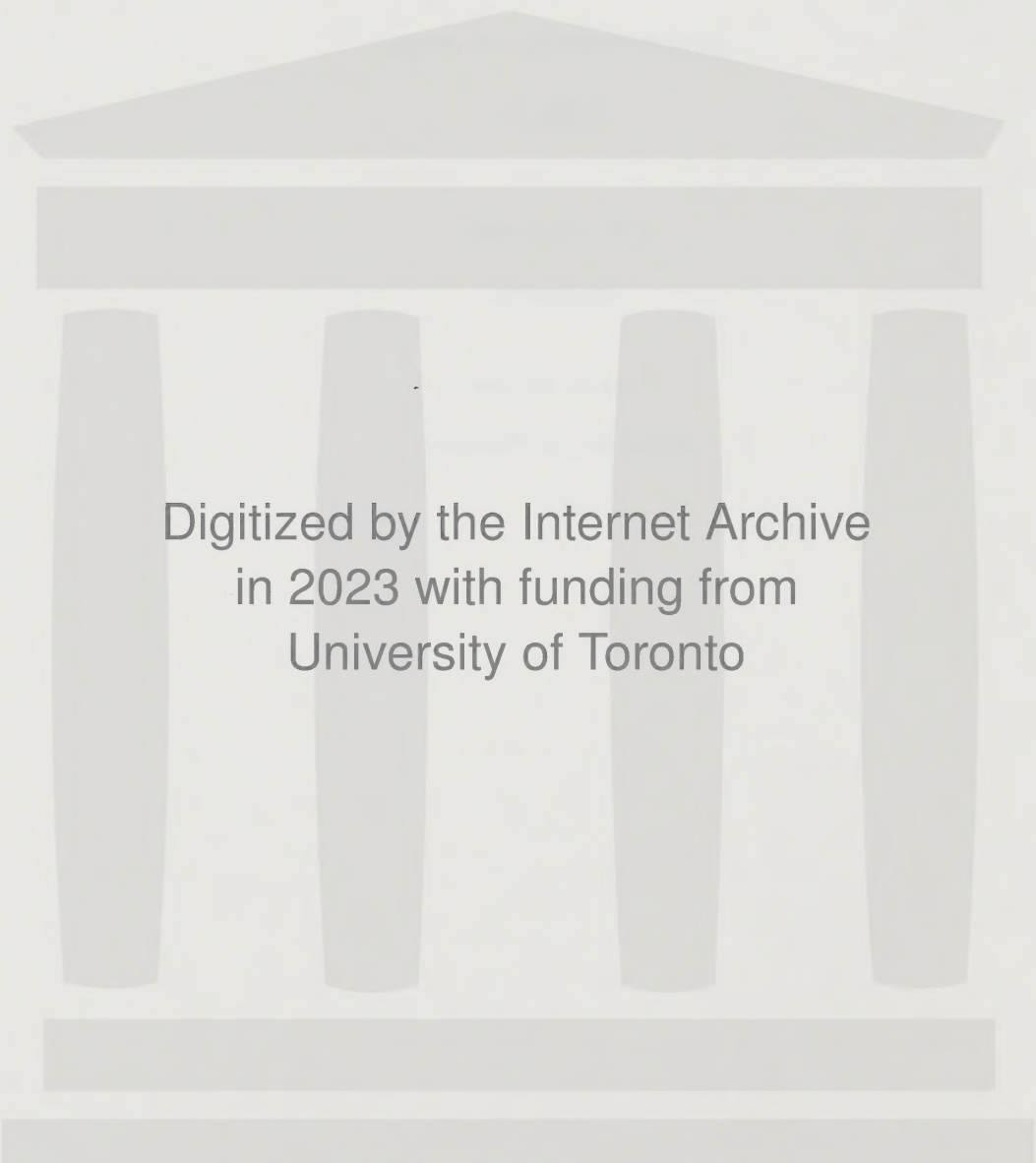

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TABLE OF CONTENTS OF PRINCIPAL CASES AND MATERIALS

Part I

CHAPTER I : INTRODUCTION 1

Section 1 - The Nature and Purpose of the Law of Torts 1

Loudon v. Ryder 2
Rookes v. Barnard 6
Crown Liability Act (Can.), s.7.2 12
Uren v. John Fairfax & Sons Pty. Ltd. 13
Broome v. Cassell & co. Ltd. 19
Cassell & Co. Ltd. v. Broome 26

Section 2 - The Origin of the Law of Torts: Herein of the Forms of Action 37

Maitland, The Forms of Action at Common Law 38
Winfield, Province of the Law of Tort 43
Reynolds v. Clarke 45
Scott v. Shepherd 47
Roberts v. Read 48

Section 3 - The Developments of Liability Based of Fault 50

The Case of Thorns 50
Weaver v. Ward 51
Stanley v. Powell 51
Brown v. Kendall 54
Fowler v. Lanning 57
Letang v. Cooper 63
Cahoon v. Franks 65
Hutchins v. Maunder 67
Escola v. Coca Cola Bottling Co. of Fresno 68

CHAPTER II : INTENTIONAL INTERFERENCE WITH THE PERSON 71

Section 1 - Assault and Battery 71

Cole v. Turner 71
Restatement of Torts, ss.2, 8A 72
Coward v. Baddeley 73
Innes v. Wylie 74
I. De S. and Wife v. W. De S. 75
Tuberville v. Savage 75
Criminal Code, s.244 76
Bettel v. Yim 76
Fourth Report Criminal Injuries Compensation Board 81
Eighth Report Criminal Injuries Compensation Board 82
Law Enforcement Compensation Act (Ont.), ss. 3(1) (a), 5, 7(2) 83
Compensation for Victims of Crime Act (Ont.), ss. 5, 17(1), 26 84

Section 2 - False Imprisonment 86

Bird v. Jones 86
Genner v. Sparkes 88
Perry v. Fried 88
Herring v. Boyle 97
Herd v. Weardale Steel 98

Section 3 - Intentional Interference with other Personal Interests: Herein of Emotional Tranquility, and Privacy 103

Wilkinson v. Downton 103
Robins v. Canadian Broadcasting Corporation 107
Restatement of Torts, s.46 111
State Rubbish Collectors Association v. Siliznoff 111
Tolley v. J.S. Fry & Sons Ltd. 117
Krouse v. Chrysler Canada Ltd. 124
Athans v. Canadian Adventure Camps Ltd. 132
Kleinfield, The Rights of Dead Celebrities 139
Privacy Act (B.C.). ss.1 to 5 142
Davis v. McArthur 143
Criminal Code, s.178.11 148
Nader v. General Motors Corporation 155
Beaumont v. Brown and Zink 160

CHAPTER III : INTENTIONAL INTERFERENCE WITH PROPERTY 165

Section 1 - Trespass to Land 165

Entick v. Carrington 165
Smith v. Stone 165
Basely v. Clarkson 165
Cooper v. Crabtree 166
Petty Trespass Act (Ont.), ss.1 to 4 167
Discussion Paper on Occupiers' Liability and Trespass to Property (Ont.) 167
Trespass to Property Act, 1980 (Ont.) 169
Mann v. Saulnier 172
Restatement of Torts, ss.158, 162 173
Van Alystyne v. Rochester Telephone Corporation 174
Woolerton and Wilson Ltd. v. Richard Costain Ltd. 177
Civil Aviation Act, 1949 (U.K.), s.40 180
Bernstein v. Skyviews 180
Restatement of Torts, s.159 185
Hickman v. Maisey 186
Hurst v. Picture Theatres, Limited 189
Harrison v. Carswell 198
Human Rights Code (Ont.), s.2 204

Section 2 - Trespass to Goods and Conversion 206

Penfolds Wines Proprietary Ltd. v. Elliott 206
Restatement of Torts, s.222A 215
Toronto-Dominion Bank v. Dearborn Motors 218
Howard E. Perry Ltd. v. British Railways Board 225

Section 3 - Intentional Interference with other Property Interests: Herein of Certain Unfair Business Practices 229

Mogul Steamship Company, Limited v. McGregor & Company 229
Combines Investigation Act, s.32(1) 235
Rookes v. Barnard 236
Board of Governors of Senaca College v. Bhadauria 243
Goldsmith v. Sperrings Ltd. 250
Canadian Tire Corp. Ltd. v. Desmond 261
Cadbury Schweppes v. Pub Squash Co. 263
Taubes, Getting Revenge on Imitations 269
CBS Inc. v. Ames Records Ltd. 272
Hubbard v. Pitt 279
Hickey v. Electric Reduction Co. of Canada 287

CHAPTER IV : DEFENCES TO ACTIONS FOR INTENTIONAL INTERFERENCE WITH PERSON AND PROPERTY 291

Section 1 - Consent 291

Restatement of Torts, s.50 291
Agar v. Canning 292
Lane v. Holloway 293
Mulloy v. Hop Sang 295
Marshall v. Curry 298
Public Hospitals Act (Ont.), Reg'n 865 302
Kennedy v. Parrott 303
Hart v. Brown 307
Family Law Reform Act (U.K.), s.8 310
Venereal Diseases Prevention Act (Ont.), s.21 311
R D (A Minor) 311
Child Welfare Act (Ont.), ss.19, 21, 27, 28, 30 319
Blood Transfusions Without Consent 324
Applebaum, Can Mental Patients Say No to Drugs 331
Mental Health Act (Ont.), ss.1, 9, 14, 31, 32, 33, 35 336
Hospital for Sick Children, Admitting Form 341
Halushka v. University of Saskatchewan 343
Reibl v. Hughes 347
Restatement of Torts, s.58 365
Hegarty v. Shine 365
Regina v. Maurantonio 367

Section 2 - Self-Defence and Defence of Others 374

Bruce v. Dyer 374
Evans v. Bradburn 377
Restatement of Torts, s.76 380
Criminal Code, ss.27, 37(1) 380
R. v. Duffy 381

Section 3 - Protection of Property 382

Restatement of Torts, s.77 383
Depue v. Flateau 384
Criminal Code, ss.40, 41 387
Katko v. Briney 387
Dog Owners' Liability Act (Ont.), ss.1-3 390
Dog Licensing and Live Stock and Poultry Protection Act (Ont.), ss.9, 10, 12 392

		King's Prerogative in Saltpetre	393
		Dwyer v. Staunton	394
		Vincent v. Lake Erie Transportation Co.	395
		Borough of Southwark v. Williams	397
Section 4	-	Legal Authority	402
		Criminal Code, ss.25, 26, 28 to 31, 449, 450, 454	402
		Walters v. Smith & Soms, Limited	405
		Christie v. Leachinsky	407
		Restatement of Torts, s.120A	416
		Regina v. Landry	417
		Koechlin v. Waugh	421
		Highway Traffic Act (Ont.), ss.19, 174, 190	423
		Fletcher v. Collins	424
		Humphries v. Commor	427

CHAPTER I: INTRODUCTION

Section 1

The Nature and Purpose of the Law of Torts

The recognition of the Law of Torts as a sufficiently singular body of law to merit identification by a rubric and segregated consideration in a legal treatise goes back only to about 1860 when an Englishman and an American published books on the subject. The word "tort", of course, was to be found both in English and French long before, and in both languages it meant "wrong". It had equivalents in Spanish and Italian and derived from the Latin "tortus", meaning "twisted" or "wrung". And, rubrics aside, the kind of problem with which this branch of the law concerns itself has been around as long as people have lived together in society, and has called for, and received, legal attention.

Wherever people live together in society the activities of some invade the interests of others and cause harm, sometimes intentionally, sometimes negligently, sometimes quite by accident. In England, let us say about the year 1066, the harm tended to be inflicted in fairly straight-forward fashion upon fairly tangible interests. People struck each other, or threatened to, spoke ill of each other, went on each other's land, and seized possession of or damaged horses and cows, pigs and sheep and various items of inanimate personal property as well. To preserve the King's Peace and prevent aggrieved individuals from relying on self-help (or going without a remedy altogether) the Norman, and especially the Angevin kings sent judges about the country to settle disputes peaceably. In others words, to apply to them a Law of Torts, nameless though it still might be.

These royal courts were not, of course, the first courts in England to deal with such problems. Indeed the history books all say that the royal courts wrested jurisdiction away from local courts, to the disgruntlement of the barons who included the issue in the Magna Carta, in the long run to no avail. But that is another story. The point of concern here is that the royal courts were the first courts developing and applying a law common to all England, thereby giving birth to the title by which the English system of law became known. Prior to the Conquest there had simply never been a central government strong enough to construct such a centralizing and homogenizing institution.

Centuries later the Common Law system spread round the world with English settlers and colonists and it continues to prevail in the Anglophone provinces of Canada, the English-speaking countries, including the United States of America, and numerous other present and former parts of the British Empire and Commonwealth. So the activity of the royal courts in post-Conquest England constituted the genesis of our Law of Torts, albeit the present generation may show scant family resemblance to its distant progenitor.

It is perhaps needless to say that the royal courts were concerned with settling disputes other than those arising out of the injuries inflicted on some by the activities of others. Those other disputes do not concern us much in this course, however, and so, our focus is almost exclusively on the injuries, the kind of conduct causing them, and what the courts have done about it all. This is a field where the law is mostly judge-made.

Down through the centuries, as society developed and grew more complex, the opportunities for harmful contact increased, and activities capable of causing harm waxed more numerous, and the interests open to be invaded became more diverse and not quite so corporeal. The Law of Torts developed more or less apace. It fell to the industrial revolution of the 18th and 19th centuries, however, to do for the Law of Torts what Henry Ford did for the automobile: bring it into the big time. It generated new interests and created opportunities and

instrumentalities for invading them by bringing more people into the close contact of urban life, putting them to work in factories with machines, sending them travelling on new roads and new rails, and encouraging them to compete for business in the mushrooming field of commerce. It remained for the 20th century to develop the most destructive activity yet, motoring, and to add to it, the radio, television, the aeroplane, the computer and various kinds of looking and listening devices. In the course of it all, in addition to interests in physical integrity, honour and tangible property already mentioned, the law has come to recognize as worthy of protection interests in emotional tranquility, family relations and various forms of economic and commercial relations and prospects. Neither the list of activities causing harm nor the list of interests which the law will protect is closed.

In early times, compensation to the injured individual and penalties to the Crown might figure as remedies in the same court proceedings. In other words, not only was there no well-defined Law of Torts, there was not even a clear-cut distinction between criminal and civil law. But the first treatise of the common law, published in 1187 and attributed to Ranulf de Glanvill, remarked that "some pleas are criminal, and some are civil". Lord Mansfield in Atcheson v. Everitt, (1755) 1 Cowp. 382 at 391, 98 Eng. Rep. 1147 said "Now there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions." And Windfield in his treatise the Province of the Law of Tort, in 1931, indicated (p. 201) that "Tort can be distinguished from crime in that the sanction for crime is punishment, while the sanction for tort is an action for damages."

So now we can say the criminal law proscribes anti-social behaviour under penalty of fine or imprisonment. The Law of Torts concerns itself only with reparation to the individual for the harm done.

Or is it that simple? Consider the following cases.

LOUDON v. RYDER
Court of Appeal. [1953] 2 Q.B. 202.

APPEAL from the verdict of a jury and judgment given thereon by Devlin J. in favour of the plaintiff for £5,500 damages for trespass and assault committed by the defendant.

The plaintiff's father, Mr. Lewis, in his lifetime, had told her that he proposed to leave her certain property in trust, No. 3 Coleherne Mews, in Kensington. Mr. Lewis died in April, 1950, and in May, 1950, the plaintiff attained 21 years of age. Mrs. Lewis was an executrix or trustee of her husband, and after his death she did not say anything about this declaration of trust; indeed, according to the plaintiff's evidence, her mother had told her that there was nothing for her. The plaintiff and one of her sisters, when at their mother's house after their father's death, opened and looked into a deed-box. In that box they found, inter alia, a document which showed that the plaintiff had become entitled to the flat, No. 3, Coleherne Mews, when she became 21 years of age. The plaintiff took the document out of the deed box and showed it to a solicitor whom she consulted.

Mrs. Lewis, the mother, had let No. 3, Coleherne Mews to a Mr. Loudon, to whom the plaintiff became engaged to be married. Mr. Loudon, on April 29, 1951, left the flat temporarily to go to Ireland on business, and the plaintiff went to live there. She changed the locks, and was there in possession of the flat on May 28, 1951, when she received a message from Staines, where Mrs. Lewis was then residing, "that they were going to "break into the flat." Thereupon, the plaintiff barricaded the door of the flat, which was over a garage in the mews, and filled a pail half full of water. In the course of the morning there arrived in the mews in a motor-car the plaintiff's mother, Mrs. Lewis, who remained in the motor-car, her gardener, and Ryder, the defendant. The defendant was a friend of Mrs. Lewis and spoke in broken English. . . .

The defendant and the gardener tried to enter the flat by the door: they could not. Thereupon a ladder was found and was

Section 2: The Origin of the Law of Torts: Herein of the Forms of Action

> So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.
>
> Maine, Early Law and Custom, (1883)

Many conflicts which fall within the province of the Law of Torts (and other branches of the law for that matter) are settled by agreement between the parties. When a person who has suffered damage agrees to a certain sum by way of compensation, to accept a promise that something-or-other will not be done any more, to forgive and forget, or when an individual who has inflicted damage agrees to pay up, to cease and desist, to say he is sorry, the agreement may or may not be based on a keen regard for the true facts and the strict legal position. Many other factors can have a bearing on decisions of this sort; whether or not one has a well-developed sense of outrage, how badly and how quickly one might need the money, whether or not one wants to go to the expense and trouble of a lawsuit, how sure one could be of winning if one did, and so on. But when a conflict within the province of the Law of Torts is not settled by agreement then it normally falls to be resolved by a court and a court must try as hard as it can to find the true facts (what really happened between the parties to give rise to the conflict) and must apply the appropriate law to those facts (decide in accordance with the prevailing theory of liability whether the damager must compensate the damaged).

The procedure by which a dispute is brought before a court to have the facts determined and the law applied is called an action. The form an action is required to take is pretty well standard even though the facts and the relevant law may vary greatly. Commonly a writ is issued out of the court office, at the instance of the party seeking redress, directing the other party to defend the case or suffer the consequences. Pleadings and various discovery procedures help inform each side concerning the case which will be presented by the other, and eventually the matter comes to trial before the court (a judge, or a judge and jury). The emphasis is, or is intended to be, on getting at the facts as economically and expeditiously as possible so that the proper law may be selected and applied. This is, however, a relatively modern procedural achievement.

Until the late 19th century the form that an action took varied considerably according to the nature of the claim being prosecuted. And in early times, the form of the action seems to have been more important than the facts of the case or the law to be applied. This historical verity had a considerable bearing on the growth of a theory, or theories, of liability, and even into the 20th century it has had a strong impact on the way the courts think about and apply theories. So by way of background to **Section 3**, which will deal with the growth of the fault theory, we must try to understand a bit about the forms of action at Common Law.